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THE "STATE OF THE ART" IN PATENT CASES.

BY

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It has been suggested that a paper on a subject connected with the law of patents for inventions might be of interest to members of The Engineers' Club. The subject of patents and the patent law is not so far removed from the interests of the engineering profession as might at first thought be supposed. The patent solicitor must note and understand mechanical differences and resemblances as well as the legal effect of such differences and resemblances upon the case in hand, the patent law being a curious compound of law and mechanics, while on the other hand the engineer is frequently called upon to deal with the subject of patents and the patent law, if from no other standpoint, at least from that of an expert engaged to assist counsel in patent litigation. Most of the engineers present this evening have engaged in patent causes in this capacity as experts, and every engineer is likely to be called upon at some time in his professional experience to deal with the question of patents from this aspect at least.

Every engineer who has acted as an expert in this way has heard repeated in the course of the case one phrase more frequently than any other, and that phrase is "the state of the art," and he has recognized sooner or later that upon this phrase frequently depends the fate of the patent in suit. It is the meaning and scope of this technical expression, "the state of the art," and its effect upon patents for invention that I wish to explain this evening.

The expert can co-operate with counsel far more effectively if he knows, in a general way at least, to what end his testimony or his research tends, and what bearing it has upon the merits of the case in hand.

Our government, in granting a patent to an inventor, confers upon him a monopoly of the invention for seventeen years. As a return for this benefit conferred the government demands of the inventor two things: That the invention shall be *useful* and that it shall be

new. The degree of usefulness is immaterial provided the invention be in fact an operative device or apparatus. But on the score of novelty the demand of the government is absolute. Both to obtain a patent and to maintain it after grant it must possess novelty. Otherwise the condition fails upon which the government granted the monopoly and the monopoly is at an end.

Now, there may be novelty in two senses—novelty from the standpoint of the individual and novelty from the point of view of the world at large. An achievement in some branch of engineering might be a novelty to me while it was an old story to the engineering profession. The standpoint of the Patent Office and the patent law is the standpoint of the world at large. All they ask is, "Has this that the inventor claims to have done for the first time ever been accomplished before?" If it has, then it matters not that the inventor was totally ignorant of the prior achievement; his application will be rejected and his patent declared invalid.

The position sometimes taken by inventors in this regard is somewhat as follows: They say, when met by a prior patent covering the same ground with their invention, "I knew nothing of this prior patent at the time that I made my invention. I acted in good faith in perfecting my device and in entire ignorance of anything that had gone before me. Why, then, should I be refused the title of inventor because of a prior patent covering the same ground, but of which I was entirely unaware?" From the standpoint of the inventor this objection seems an entirely reasonable one, but the patent law upon this subject is not based upon the point of view of the inventor or the individual, but upon the point of view of the world and the community at large.

The patent law, realizing the impossibility of determining the good faith of an inventor in this respect, has taken the position that if the state of the art discloses the device, the new-comer cannot claim any title as inventor thereof. The object of the Patent Office is to issue as far as possible one patent for each invention and to avoid the overlapping of inventions or claims in patents issued by the office. Therefore the law broadly assumes the position that an inventor must take notice, as the expression is, of the state of the art, and it results from this that if a patent is inadvertently issued for something which is already embraced in the state of the art, that patent is liable to be invalidated in case this instance of prior publication or prior use, as the case may be, is brought forward against it.

In other words, it is the state of the art and not the inventor's claim, that is used as a standard of measurement by which to ascertain the true degree of novelty exhibited by his invention.

It will perhaps facilitate our view of this point if we briefly describe the process of obtaining a patent for invention in this country. The inventor, having perfected his device in what he considers its most complete and available form, applies for a patent thereon. „In doing so he in effect says: "I have invented this apparatus or this improvement upon a pre-existing apparatus and I ask the government to protect me in my rights as an inventor by the grant of a patent."

The Patent Office, upon receiving his application, replies in effect: "You claim to be the original and sole inventor of this device or this improvement. Let us see whether you are or not." And the Patent Office thereupon proceeds through the examiner in charge of the case to point out to the applicant any instances of prior use, prior publication, or prior patent which may go to show that the inventor was mistaken in his idea that he was the first and original inventor of this device and that in point of fact the device is old and has been already patented or is already known and used.

The Patent Office examining staff is composed of about forty examiners, each having from four to six assistants. They have at their disposal a complete collection of all United States letters-patent issued since the institution of the office, and in addition foreign letters-patent and a large technical library of engineering periodicals similar to that possessed by the Franklin Institute in this city and the library of The Engineers' Club. Assisted by this collection of prior patents and of technical literature, the examiner in charge of the application points out to the inventor any instances of prior patent or prior publication going to show, as I have said, that the device has been already patented or already published and described.

The inventor thereupon proceeds to distinguish between his invention and the references cited against him, and thus by an alternate action between the inventor, or his attorney acting for him, and the examiner in charge of the application an understanding and agreement is reached as to just how much field the inventor is entitled to occupy in view of the state of the art.

For all this prior material, this mass of prior United States and foreign patents and of publications and technical literature pertaining to the subject-matter of the invention, constitutes as to that invention the state of the art.

Sometimes the reference in the shape of a prior patent cited by the examiner is, so to speak, on all fours with the device disclosed by the application. In such case, where it is impossible for the inventor to distinguish his device from the prior reference cited, the case ends then and there. Usually, however, this is not the case. The references cited by the examiner show that a portion of that field only which the inventor supposed he was solely entitled to occupy has been already preëmpted, but that a part of the field still remains open to him; and having, as I have said, reached an understanding as to just the extent of the field which the invention discloses, as to just the amount of inventive material embraced in the application, a patent for that amount of invention, neither more nor less, is sealed and issued to the inventor.

Now, we can explain this expression, "the state of the art," in another way. Let us suppose that this rectangle represents the sum of all the inventions that have gone to make up some piece of machinery which stands to-day in a highly finished form. Let us take, for example, the modern express locomotive. Let us suppose that the area covered by this rectangle represents the total number of inventions going to make up in the aggregate the express locomotive as it stands to-day. The largest single share or slice of this field was that preëmpted by the original inventor of the locomotive, Stevenson. As soon as men's minds were turned toward the possibilities involved in this new application of the expansive force of steam, inventions and improvements along this line followed one another with great rapidity, and the earlier inventions were doubtless of a very high degree of value and covered a field perhaps almost as large as that originally preëmpted by Stevenson, the pioneer inventor. Thus we can mark off successive sections of the total field and we notice that as we reach the end, and in proportion as we reach the end, the area remaining grows less, and we consequently find that to-day an invention in improvement of the locomotive does not go to the whole of the machine, but is a mere improvement upon some preëxisting and well-known part, efficient, useful, but not comparable in any wise to the extent and scope of the earlier inventions along this line. Now as to the inventors of to-day who wish to improve upon the locomotive, all this immense area stretching away back of them in the shape of prior patents, United States and foreign, that have already been granted for inventions and improvements upon the locomotive, constitute the state of the art, and each

new-comer's invention is to be measured by this state of the art extending behind him and its scope and extent determined by that state of the art.

In other words, if to the inventor of to-day the state of the art discloses anywhere in this prior mass of patents an instance of invention substantially equivalent and similar to his own, then he can no longer obtain a patent upon that improvement. If the prior art discloses only a portion of that which he has invented, then he is entitled to a patent for the remainder. It is thus apparent that upon the state of the art depends the question whether there is any invention at all in a given case, and if there be invention, how much invention is shown and may be patented.

We see then how important it becomes, both before applying for a patent and in many instances after the patent has been granted, to determine accurately the state of the art in that particular field of invention. If the inventor is to be fully protected, he must know just the extent of field covered by his invention and adequately claim that field in his patent. To know how much new field his invention covers, he must know to what extent the whole field has already been covered by prior invention, for it is only by placing, so to speak, his own achievement side by side with the sum of past achievements in the direction of his invention, that he can measure his own step in advance.

The strength of a patent depends upon the extent to which it fulfils two conditions:

First, the accurate determination of the degree of advance which the invention in question discloses beyond all previous inventions along that particular line; and,

Second, the framing by the inventor and allowance by the Patent Office of a specification and claims that shall accurately embody the precise degree of advance thus ascertained.

Given the first condition, a skilled patent solicitor can fulfil the second; but the second condition is dependent upon and valueless without the first. If the inventor and his solicitor have not before them all that has hitherto been done by others in the field of the particular invention, the utmost care and skill in framing the specification and claims, and in carrying the application through the Patent Office to issue, may be subsequently defeated by the results of a later and fuller investigation made by hostile interests, as in the case of a defense to a suit for infringement.

It is my present purpose to consider what a complete fulfilment of the first condition involves; what ground must be covered in its fulfilment; how far it is possible successfully to cover the ground; and to what extent this is accomplished by the various classes of searches or examinations made in connection with inventions and letters-patent.

This prior ground in connection with an invention is known technically as "the state of the art," and as all questions respecting the grant and validity of United States letters-patent are controlled and determined by the federal statutes at large, and the rules of the Patent Office made in accordance therewith, we must look to these laws and rules in the first place to ascertain what conditions they impose upon the inventor in this respect.

The statutes and rules provide:

1. That inventors shall take notice of the state of the art.
2. That inventors may not carry their date of discovery or invention more than two years back of the date of their application, no matter how much more than two years prior to application that date may in reality be.

This is equivalent to the statement that no patent shall be granted for a device if it be found that such a device was known or used at a date two years or more prior to the application for patent thereon, and that if an inventor on applying for a patent encounters such an instance of prior knowledge or use, he cannot, in his effort to show that he was the first inventor, carry his date of invention more than two years back of his date of application.

The reason for the first provision is obvious. When a device has once been used or described, it can no longer be considered new or novel in the sense in which the patent law uses those terms; and no subsequent use or description of it can constitute invention in the sense in which the patent law uses it. It matters not that the later inventor is acting in good faith and without the least knowledge of the prior discovery. The law charges him with notice of the prior discovery, whether as a matter of fact he knew or did not know of it. And a little consideration will show that however apparently unjust this may appear, it is the only equitable and practicable course.

The second provision—that relating to the two-year rule—is of recent date and arose in this way: Formerly, an inventor, having conceived his idea, could let it lie for five or ten years, or more, and then defeat a later and more diligent applicant by proving priority

of invention. Or an applicant, finding his progress through the Patent Office barred by a prior patent, might by forged affidavits and concocted proofs carry his date of invention back of the prior patent and thus secure the grant of a patent to himself. In a case with which I was connected a few years ago the application was filed in 1876; the patent was not issued until 1885, and the inventor, encountering certain references while passing through the Office, proved his date of invention as of 1866—ten years prior to his date of application. It was to do away with such unjust and possibly fraudulent practices that the two-year rule was enacted.

For the benefit of the inventor and those interested with him, it is therefore fundamentally essential to determine before applying for a patent,

1. Whether the application will be granted by the Patent Office.
2. Whether, if granted, the patent grant can be subsequently upheld.

After grant and issue of the patent, the same question may be put from another standpoint; *i. e.*, through prospective purchasers of or investors in the patent asking whether it is valid and can be protected against infringement in the event of a suit; and what scope in such case the courts will accord to its claims.

What ground must be covered in order to correctly and fully determine these questions—*viz.*, the propriety of applying for a patent or the validity of one already granted? Broadly stated, we must determine the state of the art prior to the inventor's date of invention; that is to say, we must determine what instances, if any, there have been of prior use, prior patent, or prior publication of the invention, bearing in mind that an inventor cannot carry his date of invention at most more than two years back of his date of application for the purpose of avoiding such anticipation.

A search completely disclosing the state of the art must show:

- (a) Whether the invention was known and used, in public use, or on sale in the United States at any date more than two years prior to the date at which the present inventor applied or purposes to apply for a patent.

This could only be ascertained by an inquiry extended throughout the United States among all parties engaged in the manufacture, sale, or use of similar articles or appliances. And to overlook a single clear instance of prior use is to overlook that which may be brought forward later to destroy the patent.

(b) Whether the invention has been described in any printed publication either in the United States or in any foreign country, at any date more than two years prior to the date at which the present inventor applied or purposes to apply for a patent.

This could only be ascertained by estimating the earliest date at which it is possible that such an invention could have been conceived, and instituting a search from this date down to within two years of the patent in question. This search would have to be extended through all printed matter, home and foreign, such as would be in any degree likely to contain the subject-matter sought.

(c) Whether the invention has been patented in any foreign patent-granting country at any date more than two years prior to the date at which the present inventor applied or purposes to apply for a patent.

This could only be ascertained by an examination of the printed and published patents of each country, from the earliest probable date at which such a patent might have been taken out down to within two years of the patent in question.

(d) Whether the invention has been patented in the United States at any date more than two years prior to the date at which the present inventor applied or purposes to apply for a patent.

This could only be ascertained by an examination of the United States patents as set out in the case of *c*.

In this connection it is essential to state briefly what amounts to or constitutes prior use or prior publication.

Prior Use: "To constitute a prior use the identical idea of means expressed in the present invention must have been reduced to practice and made available for immediate use. Neither a sketch of the projected art or instrument as the inventor has conceived it, nor drawings whether with or without verbal description, nor any model other than a practical and working instrument, nor even an application for a patent, can fulfil this requisite, since each or all of these can be produced without the existence of an operative and available invention." (Robinson on Patents.)

In *Worstwick Mfg. Co. vs. Steiger* (1883), 17 Fed. Rep., 250, the Court said: "It will be noticed that the claim of this patent is a combination claim consisting of several elements that co-operate together to produce the device claimed. This device, then, can only be anticipated by a prior device having identically the same elements, or the mechanical equivalents of those that are not used. It will not

do to find in older devices a portion of these elements in one machine, another in a second machine, another in a third, and so on, and then say that this device is anticipated."

In *Gottfried vs. The Phillip Best Brewing Co.* (1879), 5 Bann. and A. 4, the Court said: "It will be admitted that to justify the Court in overthrowing a patent granted for what appears to be a new and useful invention or improvement, on the ground that the device has been anticipated by another and earlier invention, the Court should be well satisfied by clear and credible testimony; that it was a perfected device, capable of practical use; that it was embodied in distinct form, and carried into operation as a complete thing, and was not of such a character as to entitle it only to be regarded as an unperfected or abandoned experiment."

Prior Publication: Such publication must be (1) a work of public character intended for general use; (2) within reach of the public; (3) published before the date of the later invention; (4) a description of the same complete and operative art or instrument; and (5) so precise and so particular that any person skilled in the art to which the invention belongs can construct and operate it without experiments and without further exercise of inventive skill. Unless a publication possesses all these characteristics it does not place the invention in the possession of the public, nor defeat the claim of its reinventor to a patent.

"The invention described in the publication must be identical in all respects with that whose novelty it contradicts. The same idea of means in the same stage of development as that which the inventor of the later has embodied, must be thereby communicated to the public. The invention thus described must also have been a complete and operative act or instrument, ready for immediate employment by the public. And it must be described not as a mere hypothesis, either in method or in possibility, but as an existing fact already known." (Robinson on Patents.)

The publication must not only be intended for the public, it must also have been placed within its reach. In other words, it must have been actually published in such a manner that any one who chooses and seeks may avail himself of the information it contains. It is not necessary that many copies of the work should have been printed, nor that its distribution should have been extensive; for the deposit of a single copy in a library to which the public has or can obtain admission places the work within the reach of all. Nor is it

requisite that any person should have read or seen it, since the accessibility of knowledge and not its actual possession is all that any inventor can secure. And even though the information be so intermingled with discussions relative to other subjects that it may easily escape attention and would require some skill and patience to extricate it, the publication will still be sufficient.

The foregoing explanations will serve to show in a general way what is meant by the terms "prior publication" and "prior use." It therefore amounts to this: That if the state of the art discloses anticipation in the shape of a prior use or a prior publication of the character above explained, and of such a date as the inventor cannot overcome, regard being had to the two-year rule, then such an application is inadvisable, and if application is, nevertheless, made and a patent is granted thereon, such patent is invalid.

Having stated the requirements of the law as to novelty and the manner in which those requirements are construed by the courts, it remains to consider what means we have for fulfilling those requirements by ascertaining the state of the art and consequently the degree of novelty exhibited by any particular invention.

To throw light upon the state of the art, recourse is had to searches. They are practically divisible into four classes:

1. The search made by the inventor or his attorney preliminary to application.

2. The search made by the Patent Office examiner in charge of the application during its progress to grant and issue.

3. The search made on behalf of prospective purchasers of or investors in the patent, after grant, to determine its strength and scope.

4. The search made by a defendant when sued for infringement and seeking to establish anticipation of the patent as his defense.

1. What the search prior to application covers: The first search usually made is by the inventor or his attorney prior to applying for a patent. It is rare for this search to be extended beyond prior United States patents along the particular subject-matter of the invention.

2. What the Patent Office search covers: The application appearing to be novel is filed in the Patent Office and thereupon the examiner in charge cites against it prior United States patents which he considers pertinent, also prior foreign patents and to some extent prior publications.

The United States patents are classified and arranged in accordance

with an elaborate system in such wise that the examiner in each department is supposed to have under his eye at the time that he is examining an application every prior United States patent already granted for the same or a similar subject-matter. Beside this mass of prior patents he places the applicant's device and determines the degree of patentability in accordance with this comparison.

It is somewhat unusual to have prior foreign patents cited against an application in our Patent Office, and still more unusual to have prior publications in technical and engineering journals cited against an application. I am told, however, that in electrical cases and other special classes of invention the citation of prior publication and prior foreign patents is very common.

It is proper in this place to refer to a very general misconception regarding the examination as to novelty which an application undergoes in passing through the Patent Office. There is a prevalent impression that an application is subjected to so thorough and exhaustive a scrutiny in its passage through the Office that its final grant and issue amount to a guarantee of its novelty, and that the patent is thereafter safe from attack. A little consideration will show how far this view is from the truth.

Suppose the examiner decides that a certain prior patent does not constitute an anticipation. This is necessarily only a matter of opinion, and his judgment may not be infallible. It happens by no means infrequently that the courts adjudge a patent invalid because of anticipation by a prior United States patent which the examiner possibly had before him and decided to be no bar to the application. It amounts, then, to this: that in granting a patent the Office merely says in effect: "In our opinion such prior patents as already exist along this line constitute no anticipation of your invention. This conclusion has been reached by a more or less qualified expert in this class of apparatus or devices, aided by a carefully classified list of all prior United States patents bearing upon the subject. But we do not and cannot guarantee to you the correctness of our conclusion."

Of course, the ability and skill of the examiners vary in the different divisions of the Office, and the average of ability is fairly high, but the inconclusiveness of their judgments is shown by the fact that out of all the United States patents subjected to the scrutiny of an infringement suit a large number are declared void by the courts because of anticipation by prior United States patents.

This is the second search made to determine the state of the art. Now should the patent issue and the inventor attempt to dispose of his invention to capitalists, those who undertake to put money into an invention for the purpose of exploiting it will rarely do so without making or having made an independent examination into the state of the art, in order to determine the value or validity of the patent.

Such a search, if made by a competent attorney, is usually of more value than either of the two searches preceding, for the reason that we have the advantage of all the information elicited by the preceding examinations and in addition thereto a more complete examination into the prior foreign patents is often made than is made by United States Patent Office before grant. It is made from a skeptical standpoint, throwing the burden of proof strongly upon the patent to establish clearly its rights. It may and often does cover both the home and foreign field of prior patents more completely than the Washington Office, and the bearing of any prior patents upon the patent in question is apt to be more fully and carefully considered. Through the interests involved, more time and expense are justified than in the search made by the Washington examiner, and a broader field is usually covered by such an examination.

None of these three searches enumerated does or can cover, however, the entire field embraced in the state of the art, for the reason that at most they can only take account of prior United States and foreign patents and of the more notorious instances of prior publication in well-known technical journals and publications.

But this, although an immense field in itself, is by no means the entire field occupied by the state of the art, for we have in addition thereto to reckon with instances of prior use.

It is, in the nature of things, impossible for either the Patent Office or an attorney making an independent examination to ascertain whether a device patented or proposed to be patented has been already in use, since that use may have taken place in any quarter of the United States, and provided it is such a use as answers the requirements of the patent law, it would nevertheless, in spite of its having taken place in an obscure quarter and for a very short period of time, be sufficient to overturn the patent against which it was brought forward.

Therefore we come to the fourth and last examination into the state of the art, which is practically made in connection with letters-

patent and that is in the course of a suit for its infringement. Every engineer who has acted as an expert assisting counsel in cases of this description is well aware that the defense set up by an infringer is usually divided into two branches; first, non-infringement—that is, that his device as manufactured and sold does not actually in point of mechanical resemblance infringe the plaintiff's patent; and second, that granting that there is infringement in the case, the plaintiff's patent is invalid because anticipated by a prior patent, a prior publication, or an instance of prior use. This latter defense is by far the most common in these cases, and it is this defense which brings up, so far as it is possible to bring it up, the entire state of the art in connection with any patented device involved in such litigation. The interests involved in these suits being frequently very large, both sides are eager, the one to bring forward an instance of anticipation, the other to defend the patent, and the four quarters of the civilized world are usually ransacked for instances of prior publication, prior patent, or prior use.

It is only after a patent has passed this ordeal that it can in any true sense be considered as established, for the reason that it is only in such cases that the state of the art by which the degree of invention shown by a patent is measured is brought forward, if at all, to any complete degree in suits for infringement of letters-patent. All that is then brought forward and passed upon by the court becomes practically *res adjudicata* as to the patent in question. For these reasons it is often said that a patent is not a truly valuable, marketable commodity until it has passed the ordeal of an infringement suit.

We thus see over how enormous a field our inquiry must be extended if we would know the precise status and validity of our patent. It is a field co-extensive with the civilized world and the intelligent activity of men. And the natural conclusion is that patents for invention are precarious and uncertain things unless refined in the fire of an exhaustive judicial investigation.

The foregoing may be considered to present perhaps a very gloomy outlook both for the would-be inventor, the actual patentee, or for those having capital invested in a patent, since it is easy to see that it is quite impossible in the ordinary run of cases to fully ascertain beyond peradventure that the state of the art does not somewhere contain an instance of anticipation. It is only proper, therefore, that we should consider briefly the redeeming features of the situation. In the first place, a very small percentage of the patents granted

are subjected to this ordeal of an infringement suit, and in the case of those involved in an infringement suit there still remains the saving grace accorded by the courts in their point of view regarding such patents.

The grant of a patent by the government creates a *prima facie* presumption in favor of the patent. The courts realize that the patent law has been established for eminently utilitarian purposes, to encourage invention and to promote the industries and the useful arts. Therefore they are active to protect a patent involved in suit and to sustain it until and unless an undoubted instance of prior publication or prior use is brought forward against it.

Every intendment is made in favor of the patent, and an instance of prior publication or prior use must, so to speak, be on all fours with the patent before the courts will allow it as an anticipation. Therefore, as wide as may be the field in which an instance of anticipation may be sought and found, it is nevertheless offset by this fact, that it will not do to find an instance of partial anticipation or to bring forward a part of the patent shown in one prior device and another part in another prior device and, putting them together, say there is here an anticipation of the patent. The court requires that the anticipation shall be a prior publication or prior patent or instance of prior use of a device which substantially in all its details answers to the device involved in suit.

The infringer knows that the burden and expense of proving anticipation lie upon himself, while the patentee can stand upon the grant of his patent by the government until it is overthrown. And before it can be overthrown a clear anticipation must be shown. If there is a doubt, it is resolved by the courts in favor of the patentee. The attacking party cannot piece out a machine by taking one part here, another there, and a third elsewhere, and bring the whole forward as an anticipation of the patent in suit. Most patents to-day are for new combinations of elements all of which, separately considered, are old. Such a patent can only be overthrown by showing the prior use or description of the same elements, or their mechanical equivalents, assembled in a machine performing substantially the same operations. And the more useful or meritorious an invention, the more do the courts incline in its favor when thus attacked, and the stricter the proof they require of clear anticipation.

A question that may naturally be asked I will endeavor to answer here. It may be said, since the United States Patent Office cannot

secure an inventor against this state of the art completely, why does it attempt to do so at all? The foreign patent-granting countries, with the exception of Germany, adopt this view and grant to an applicant whatever he claims as his invention, leaving it to the courts or to future circumstances to determine what the extent of his real invention in the premises may be. This was likewise our method prior to 1836. I think our method of a partial examination is the better one for several reasons, one of the foremost being that it, in a great many instances, saves inventors from a further expenditure of time and money in the promotion of a patent that is clearly invalid by reason of a prior United States patent granted for the same subject-matter. The inventor being met at the outset by a patent on all fours with his idea is saved from going further, and capital is saved from investment in a patent clearly invalid at the outset. Then, too, our office, if it does not show the application to be invalid *in toto*, acts beneficially to restrict the applicant within the field that he may reasonably be entitled to occupy and thus saves him from an erroneous view as to the extent of the ground his patent may cover. Then, lastly, it should be borne in mind that the popular view is that a patent granted by the government amounts to a guarantee of originality, and this impression, however erroneous it may be, as we have seen serves to prevent very many would-be infringers from trespassing upon the territory of a patent, as they would undoubtedly do if the field were known to be open to all, as in the case of patents granted abroad, where there is no examination made as to novelty before grant.

While, therefore, the odds against the validity of a patent seem to be very great, they are in effect and in the practical working out of the system much less than they appear to be, and what has been said upon this subject should not be taken as a discouragement either of inventors or inventions, but simply as a statement showing the true position which a patent occupies in the total field of invention.

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